

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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H. CHRISTINA CHEN-OSTER, et al., : 10-CV-06950 (AT)
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Plaintiffs, :
:
v. :
: 500 Pearl Street
GOLDMAN, SACHS & CO., et al., : New York, New York
:
Defendants. : November 19, 2019
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TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY CONFERENCE
BEFORE THE HONORABLE ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE CLERK: This is a status conference, 10-CV-6950,
2 Chen-Oster, et al v. Goldman Sachs & Co., et al.

3 Attorneys, please state your name for the record.

4 MR. KLEIN: Adam Klein for Outten & Golden for the
5 plaintiff.

6 MS. DERMODY: Good afternoon, Your Honor. Kelly
7 Dermody from Lief Cabraser. With me are my colleagues
8 Valerie Comenencia Ortiz and Rachel Geman.

9 MR. GIUFFRA: Good afternoon, Your Honor. Robert
10 Giuffra with Sullivan & Cromwell for the defendants.

11 MS. WILLIAMS: Good afternoon, Your Honor. Hilary
12 Williams from Sullivan & Cromwell.

13 MS. DAVIDOFF: Good afternoon, Your Honor. Amanda
14 Davidoff also from Sullivan & Cromwell.

15 MR. LEVY: Josh Levy, Sullivan & Cromwell for
16 defendants.

17 THE COURT: Good afternoon --

18 MR. KLEIN: If I could mention. I'm sorry. My
19 colleague [inaudible] is with me as well.

20 THE COURT: Welcome all. Oh. There's someone on
21 the telephone? I didn't realize you were on the telephone.
22 My apologies.

23 MR. STROMBERG: Good afternoon, Your Honor. This is
24 Daniel Stromberg from Outten & Golden for the plaintiff.

25 THE COURT: Good. Someone overhead watching over

1 us.

2 So I noticed -- I've read the status report
3 obviously and I noticed that the plaintiffs argue that it's
4 premature to address several issues, such as trial planning
5 that Goldman wants to address. But Goldman argues that it's
6 premature to address the issues that the plaintiffs want to
7 address. So I think in light of that we don't need to do
8 anything and we're done for the day. No?

9 I think we'll just go down the list starting with
10 Goldman privilege logs which unfortunately I thought we had
11 resolved but apparently there continue to be some issues, and
12 am I correct that that's regarding the list serve and the job
13 positions?

14 MS. DERMODY: Yes, Your Honor. We identified a list
15 of nine general categories of deficiencies in Goldman's
16 privilege logs. We received nine privilege logs with a total
17 of around 8,500 documents over the last couple of months. We
18 are still needing and conferring over a few of the
19 deficiencies but there are a few things that we need right now
20 in order to move forward.

21 THE COURT: All right. What are those things?

22 MS. DERMODY: So the first would be there are some
23 missing authors and recipients for some of the documents
24 listed on the privilege logs that includes a list that we've
25 received just last night of job positions for authors and

1 recipients. It also includes some of the revised privilege
2 logs that did not include any authors or recipients. So we
3 would like to receive the full information of all of the
4 authors -- all the recipients of all the documents listed.

5 THE COURT: Okay. I want to make sure I understand.
6 I saw it as there's the issue of the list serve that you have
7 a category of but you don't know who's in it; and b) there are
8 certain people whose job positions have not been identified.
9 I may have misread it but was it -- I thought that that was
10 134 persons for whom they have not been provided. Is that
11 right?

12 MS. DERMODY: Yes. Yesterday we received a list of
13 additional information from that list. We are still reviewing
14 that list. We identified that there are still a few people
15 that they have not provided job information for.

16 THE COURT: It seems like the larger issue though is
17 the list serve. So have they provided any information
18 regarding who is in the list serve?

19 MS. DERMODY: No. So we have a list of around 160
20 list serve that are just really -- some of them very broad.
21 Like gs@gs.com, ods@gs.com, bogus@gs.com. We have no
22 information from these and we understand that we need a list
23 of all the members who are part of that list search and also
24 all the people who have access to information from that list
25 search, send it or receive it.

1 THE COURT: I thought that Goldman was going to
2 undertake to provide information about the list serves and
3 whatever method it was going to pursue. It hasn't provided
4 anything?

5 MS. DERMODY: No.

6 THE COURT: We'll find out from them. All right.
7 Let me ask Goldman where we are on that.

8 MR. LEVY: Sure. Josh Levy from Sullivan &
9 Cromwell. So I think Your Honor started this off saying that
10 a number of the issues here were premature and I think the
11 privilege logs are a particularly good example where as
12 plaintiffs noted we provided multiple logs including revised
13 logs back in September.

14 We received a letter from plaintiffs, a 14 page
15 single spaced letter from plaintiffs about two weeks ago.

16 THE COURT: They're being very diligent.

17 MR. LEVY: And we are also being very diligent and
18 engaging with all of those arguments and a lot of the issues
19 that they've raised I think we can resolve in the meet and
20 confer process. We're aiming to get a response to them this
21 week and I think that will address a lot of the issues that
22 they're raising and many of these issues, like the Lisers
23 [Ph.], for example, that plaintiffs added a full page to the
24 status report two hours before it was filed. We obviously
25 haven't had a chance to meet and confer on those issues.

1 THE COURT: Well, this issue has been going on for a
2 while. So that's why I'm not understanding what -- where the
3 state of play is if you will on the list serves themselves
4 because we discussed this last time, didn't we, and I thought
5 Goldman said they were going to -- it wouldn't be perfect but
6 they are going to undertake to provide information about the
7 list serve using again whatever process they were going to use
8 and then there were going to be some blanks to fill in. Do I
9 have that -- is that your understanding over on the plaintiff
10 side?

11 MS. DERMODY: That's right.

12 THE COURT: So why hasn't that happened or if it has
13 happened what part of it has?

14 MR. LEVY: Sure. So I think that process is
15 currently underway. I think that's --

16 THE COURT: What does that mean?

17 MR. LEVY: So I think what Your Honor described is
18 the process we agreed to undertake for the job position data
19 and in terms of the job position data we've now provided the
20 plaintiffs 99.9 percent of all of the over 3,000 unique
21 individuals listed across all the privilege logs we provided
22 to plaintiffs.

23 THE COURT: Of the 134 that they said weren't
24 identified, how many of those are identified in what you've
25 recently sent over?

1 MR. LEVY: 129 of them. There are five people who
2 we've been unable to identify. The other, over 3,500 people
3 we have provided specific job position data to plaintiffs.

4 THE COURT: All right.

5 MR. LEVY: So we don't think that there's actually
6 an issue here that requires the Court's attention.

7 THE COURT: I would say that's a pretty good job.

8 MR. LEVY: Thank you, Your Honor. Credit to some of
9 the people still in the room for that.

10 THE COURT: What about the list serves?

11 MR. LEVY: Sure. In terms of the list serves, I
12 guess break that into two pieces. First, plaintiffs mentioned
13 that they identified certain documents on the logs that didn't
14 have all their recipient information at all. So that's 36
15 documents that were produced with redactions and those
16 documents were pulled from databases. They're not emails or
17 those kinds of communications that have to/from information.
18 They're a single entry pulled from a centralized database. So
19 there is no to or from data that exists for that which is why
20 it's not included on the log.

21 Again, this is the kind of thing that will be
22 included in our submission that we'll send to plaintiffs.

23 In terms of the list serves, so there's a couple of
24 different categories. We've been working very diligently with
25 both the IT personnel at Goldman Sachs and with our vendor to

1 see what's technologically feasible in terms of identifying
2 the members of the list serves.

3 So I think the starting point there is that for
4 almost all the list serves on the face of the list serve you
5 can tell exactly who the categories of people there are. So
6 just to take a couple of examples, and these examples are
7 coming from plaintiff's list that they sent us. 2006
8 diversity task force and newyork.email.gs.com is pretty
9 clearly the 2006 diversity task force.

10 THE COURT: Yes, but who's on that? Who does it
11 include? Does it include people who aren't lawyers? Does it
12 include people who are lawyers? Does it include people who
13 don't need to know information if it does include lawyers?
14 How did they make those determinations just by the name?

15 MR. LEVY: Sure. So in terms of the actual people
16 on the list serve, there is no systematic or programmatic way
17 that it's really technologically feasible to figure out
18 exactly who the senders and recipients are, and I don't think
19 that information is really needed to be able to assess the
20 privilege. For none of these list serves are we claiming
21 privilege based on attorneys who might appear on the log. Any
22 privilege would have been created either by others
23 specifically identified attorneys just as a sender to the list
24 serve or that the document itself doesn't contain an attorney
25 and it reflects legal advice provided by an attorney.

1 So we're not claiming that somewhere in this list
2 serve there's a hidden attorney that's creating the privilege.
3 The privilege is not being created by the list serve.

4 THE COURT: But it couldn't it be waived by someone
5 who's on the list serve or some group of people? In other
6 words, that they were included and received and -- when it was
7 disseminated and that somehow waives the privilege?

8 MR. LEVY: No, Your Honor, because all of these list
9 serves are internal to Goldman Sachs and this would be a good
10 example of a 2006 diversity tax force. It's being sent then
11 to a specific group of people who necessarily have a need to
12 know that information. So, for example, there's a counsel to
13 the diversity task force and maybe sending an email to the
14 list serve is exactly the kind of document that would be
15 withheld on a privilege log and knowing the specific identity
16 or the specific positions of what division the people on the
17 list serve are on isn't really going to facilitate assessing
18 any claims of privilege.

19 THE COURT: So I -- -again, this is my recollection
20 I may be wrong from the last time we met that Goldman said it
21 had a process it was going to be able to use to identify a
22 high percentage of these people. I think I'm hearing now that
23 it's not going to happen at all.

24 MR. LEVY: So again I think that's the process we
25 committed to for the job position data and that's the one that

1 we were successfully able and -- a fairly burdensome process
2 but we were in the end able to provide the information.

3 On the list serves what we are able to do based on
4 our discussion so far is it is -- it may be possible for
5 certain documents to manually go in and try to match up
6 individual emails with other repositories of data and there is
7 no way to kind of automatically match a specific email. The
8 emails themselves don't contain the actual recipient lists in
9 the metadata in the document themselves. They only contain
10 the list serve. So going into kind of underlying repositories
11 of data. And this requires going back 20 years [inaudible]
12 privilege logs include documents going back to 2001. It may
13 be possible to identify certain -- if we're able to manually
14 match a document to an entry to then identify the specific
15 recipients.

16 So I think -- this is again how we're going to offer
17 to do this and continue to meet and confer with plaintiffs.
18 There is specific list serves. I think -- they mention three
19 specific list serves. So if there are three specific
20 documents where they can't on the face of the document
21 necessarily tell who the group of people is then that's the
22 kind of thing that we would absolutely be able to offer to
23 work with them and try to determine who the exact recipients
24 were. But that sort of manual searching isn't scalable across
25 hundreds of documents. On there I think because the list

1 serves are all internal and for the most part tell you exactly
2 who the categories of people are on their face they're not
3 really needed to assess any claim of privilege.

4 THE COURT: Let me hear from the plaintiffs.

5 MS. DERMODY: Yes, Your Honor. We disagree that
6 just listing list serves list of names is enough. By that
7 logic Goldman could just send every email to the whole company
8 and they remain privileged. The losses that -- a corporate
9 employee in order for a communication to be privileged has to
10 -- has to have a need to know the information and it's clear
11 that where an employee does not have that need to know that
12 any privilege that was attached to that communication is
13 waived.

14 So in order for us to be able to make that
15 determination to be able to evaluate whether the privilege was
16 not waived or was properly attached to these documents we need
17 the information for all the individuals in these list serves.

18 It seems like Goldman did not do an analysis of
19 these list serves up front as -- what it seems from their
20 position. They should have done an analysis of the potential
21 membership of these list serves in order to be able to assert
22 the privilege in the first place.

23 So what we're asking in order to accommodate some of
24 Goldman's concerns is the members of each list serve by
25 January 1st and July 1st of every year we think that is a fair

1 compromise considering that this is information that Goldman
2 should have included in the first place.

3 THE COURT: How many different list serves are
4 there?

5 MS. DERMODY: There are at least 160.

6 THE COURT: That's a lot.

7 MS. DERMODY: And they are listed across more than
8 430 or 40 documents.

9 THE COURT: Are there ones that you think you need
10 more than others or ones that you can rule out that you
11 wouldn't need them for?

12 MS. DERMODY: Well, we've already actually ruled out
13 list serves that include names like legal. So we've already
14 ruled out those that we believe have a higher likelihood of
15 only belonging to attorneys.

16 THE COURT: Right. But what about ones that perhaps
17 because of the list serve to whom it's going it just not
18 likely to be as fruitful in terms of information you would
19 think would be needed?

20 MS. DERMODY: I think that would be -- our position
21 is that that would be all of the -- 160 list serves were
22 included in documents that were for the most part withheld.
23 Only 30 of those documents -- communications to list serves
24 were sent by attorneys were around 30. So the vast majority
25 of these are communications that were not even sent by

1 attorneys.

2 THE COURT: Okay. So the problem is obviously
3 there's information that ordinarily needs to be provided to
4 sustain a claim of privilege. It is the party who asserts the
5 privilege who has to provide that information but we do have
6 an issue of practicality here it sounds like that an en --
7 potentially an enormous amount of work would be required but
8 it's still not clear to me that Goldman can't do something
9 here.

10 What about this idea of identifying who's on the
11 list serve for two points during each year?

12 MR. LEVY: Sure, Your Honor. I think -- to answer
13 your question, I think while two points is certainly less
14 burdensome than more than two points, I'm talking about 160
15 list serves, many of which I think really directly on their
16 face tell you exactly who the category of people are which is
17 what you need to know to actually access the privilege but
18 still the burden of that would far outweigh the benefit.

19 So plaintiff's own example I think makes this point.
20 They give the example of an email sent to all of GS. Well,
21 then they don't need to know the identify -- I mean under that
22 example they would be demanding every single and employee --

23 THE COURT: Right.

24 MR. LEVY: -- of the hundreds of thousands
25 employees. They don't need to know that to assess the

1 privilege. They can make an argument about whether or not
2 confidentiality is waived or not simply on the face of that
3 email.

4 THE COURT: I agree with you in that situation where
5 it's to everybody but that's kind of an extreme situation.

6 MR. LEVY: And similarly, I think when you have a
7 more specific list serve then you also don't need to know
8 exactly who is on a specific committee. You know it went to
9 that specific committee. So, again, just to read -- we give
10 one example. We give plenty of more on plaintiff's own list.
11 Employee relations advisors, ER leadership team, Goldman Sachs
12 board distribution. These are the names of list serves
13 they're asking for information on. They know exactly what the
14 category of information is. To assess whether or not
15 privilege was waived you can assess that on the face of the
16 list serve and the extremely burdensome manual effort, which I
17 think we can do that if we're talking five, ten, 20 documents,
18 that's something doable. When we're talking about hundreds,
19 whether you're talking 200 is less burdensome than 500 but
20 hundreds it's still going to take weeks and weeks and many
21 hours of burden for very little benefit.

22 THE COURT: What is the process then you actually
23 need to employ to identify who's on those list serves?

24 MR. LEVY: Sure. And this data may not exist for
25 every single document. I think I guess also to take a step

1 back. We're talking about documents going all the way back
2 from 2001 and plaintiffs had some of these logs since 2011 and
3 saying that we needed to identify the specific numbers of
4 these list serves up front when they waited ten years to raise
5 this I don't think really works but the exact process would be
6 that there's sort of two separate areas where the information
7 would be contained. One is what we actually exported or the
8 actual emails themselves, and none of the data is contained --
9 that they're looking for is contained in any of those actual
10 emails.

11 There's then an underlying repository that would
12 indicate the actual specific names of senders and recipients
13 for emails but there's no easy to way to match up any of those
14 to a specific email. There's no kind of unique identifier.
15 You would sort of need to -- you need to manually go in and
16 look at the metadata and say oh, this email was sent by this
17 person on this day with a subject line and there might be
18 multiples. So there's no kind of automated way.

19 We've been talking to our IT personnel and vendors
20 for weeks and they've confirmed that there really is no
21 automated way to do this. So a person would need to manually
22 go in and run these searches which is why if they've got list
23 serves they asked questions about it that's fine. Doing this
24 across hundreds of documents is really not feasible as a
25 practical matter and it would just take hundreds of hours.

1 So it can be done for a small number of people and
2 we're happy to work with plaintiffs and in our submission
3 we're going to send to them shortly we'll offer to do so and
4 explain some of this material but I think doing this across
5 hundreds of list serves is just not practical.

6 THE COURT: Let me ask plaintiffs. So let's say you
7 get a list serve with the identities of the individual people
8 on that list serve, what do you think it's going to show you
9 that would help you in terms of either getting documents or
10 information that you think you're entitled to?

11 MS. DERMODY: Yes, Your Honor. So we would do the
12 same process we've done with the privilege logs that we've
13 received with otherwise complete information of authors and
14 recipients. We would look at their oppositions and we would
15 try to determine whether there are any employees that don't
16 seem to have had a need to know that information.

17 We -- I should note that for the list serves that
18 defendants have mentioned it seems like those would be the
19 easiest to find a membership of those list serves. If they're
20 claiming that these list serves only contain board members or
21 members of the committee, it seems like Goldman should have
22 that information especially if it's asserting that everyone
23 there had to need to know the information and no one would
24 have waived the privilege.

25 It seems like Goldman is asking to be rewarded for

1 overage by attaching a lot of documents in these privilege
2 logs and only listing a list server can now claim that there
3 are too many documents and that it can't really go over all of
4 these and it would be too burdensome.

5 So we're asking for the information that Goldman
6 should have for all these list serves.

7 THE COURT: All right. Look, I do find it hard to
8 believe that every single one of those documents is going to
9 turn out to be privileged. It is a lot of documents.

10 But what I'm going to ask that you do is this. That
11 we choose a certain number of list serves that you'll get the
12 information for. You'll test the waters with it. If it helps
13 you discern anything and that bears fruit then that may open
14 the door to additional work on Goldman's behalf to identify
15 additional list serve information.

16 I'm trying to gauge what is an appropriate starting
17 point for that in terms of the number. Then I can see picking
18 like ten different time points across different years and for
19 a certain number of list serves they would have to provide
20 that information. I'm open to suggestions on what the number
21 should be.

22 MS. DERMODY: Your Honor, we would also ask for all
23 titles or subject matters, more detailed descriptions for all
24 of these documents so that we can focus a little bit better on
25 which documents seem to ==

1 THE COURT: It's hard to say though. They have to
2 provide better subject matter for every single one. I think
3 you need to be able to say here are ones we think are
4 insufficient rather than have them go back and try to provide
5 more information for 8,500 documents.

6 MS. DERMODY: Just the titles or the relines for all
7 of these documents would be at least helpful for us to be able
8 to focus a little bit better.

9 MR. LEVY: Your Honor --

10 THE COURT: Yes, please go ahead.

11 MR. LEVY: -- if I could be heard on that. I think
12 to the point plaintiffs just raised, adding a subject line may
13 well reveal privileged information in terms of withheld
14 documents. And in terms of redacted documents, plaintiffs
15 have that information already since the documents were
16 produced with redactions. They would have the subject line at
17 every point and an entire email thread.

18 Adding a subject matter line would effectively
19 require redoing the entire privilege logs.

20 THE COURT: Well, not if you have it -- I don't
21 know. I was going to ask whether you have that as a field
22 that's been preserved in some way or easily isolated in which
23 case then it just presumably can be done fairly easily but I
24 don't know.

25 MR. LEVY: I would add to that point that many of

1 the logs are categorical. So different emails that would fall
2 in the same category may not have the same subject line making
3 it effectively impossible to provide a subject line for a
4 category of documents.

5 THE COURT: Well, you should -- right. I think as
6 plaintiffs point out though it's not -- they shouldn't bear
7 the burden of plaintiffs doing it in a way that makes it
8 impossible to figure things out.

9 MR. LEVY: I agree with that and I think that the
10 logs themselves provide a detailed description that enable
11 plaintiffs to do that. They provide the to and the from and
12 the names of the list serve in almost all -- almost all of the
13 cases the plaintiffs have identified themselves state on their
14 face what the type of list serve is and exactly who the
15 membership is going to be.

16 To I guess address Your Honor's proposal, you said a
17 reasonable number of list serves. So I think we would --
18 given that we're talking -- Your Honor proposed ten specific
19 points in time. I think --

20 THE COURT: I just pulled that out of the hat.

21 MR. LEVY: I think we're amenable to that and I
22 think five list serves would be a reasonable number.

23 THE COURT: It's going to be more than that.

24 MR. LEVY: I guess the concern in terms of our side
25 is if you five list serves at ten points in time --

1 THE COURT: It's a lot.

2 MR. LEVY: -- you're already talking about 50 and in
3 effect it's bigger. It's now into the hundreds which is
4 exactly the burden that we were concerned about.

5 THE COURT: Right. So maybe we'll reduce -- you
6 know what, I'm a little leery of just pulling an arbitrary
7 number out without knowing exactly how much work is involved
8 but I could say let's do 25 list serves. Not at every point
9 in time but in combination. In other words, pick 25 list
10 serves. Identify whatever time point you want for that
11 particular one and let's see what it yields.

12 At the same time I think I'd like the plaintiffs to
13 identify 50 documents, I realize it's a list of 8,500, that
14 the defendants are going to provide me in camera to just take
15 a look at and assess.

16 MS. DERMODY: Your Honor, the one thing I'm
17 concerned about that was just said by defense counsel is that
18 we may not be able to get subject matter re lines or titles
19 because they've made categorical designations. Every time we
20 talk about this it's like we hear something new that's
21 disturbing.

22 THE COURT: Right.

23 MS. DERMODY: So we thought we had 8,000 some odd
24 entries on various logs, most of which we just found out
25 about. Now we might have 8,000 masking how many others.

1 THE COURT: Well, I think you --

2 MS. DERMODY: A 1,000, 20,000?

3 THE COURT: But I thought you knew that they have
4 category -- they have categorical designations that include a
5 number of documents. You've known that already. I'm not sure
6 what you're saying that's different.

7 MS. DERMODY: Well, if the entry is actually
8 covering a whole bunch of documents and we don't have them
9 separated --

10 THE COURT: Isn't that what a categorical entry
11 does?

12 MS. DERMODY: Yeah. And I'm concerned that how are
13 we supposed to indicate what 50 documents are the most
14 concerning. We don't have the subject matter. We don't know
15 if there's variation in the authors and recipients. I mean
16 this is kind of absurd privilege discussion because in the
17 normal case you get a log. You find out who's on the
18 document. You find out what the name of the document is and
19 you can figure out whether it's worth challenging or not.
20 Here, there's a mirror behind every door behind every mirror
21 where we're back to going -- do we even have our hands around
22 the scope?

23 THE COURT: I understand the concern but when you do
24 have a large litigation where there are huge numbers of
25 documents you're going to have larger privilege logs and

1 that's why it is permissible to have categories of privileged
2 items. Everything within reason of course. But it can't be
3 handled in the same way that you would handle something where
4 there's maybe 100 privileged documents. There just has to be
5 another practical way of dealing with it and that's why I
6 think we need to test the waters and see if it starts bearing
7 some fruit.

8 MS. DERMODY: So then, Your Honor -- I'm sorry. If
9 we could then ask for an order to export what subject matters
10 are [inaudible] exported it would help us to identify -- I
11 mean it would help us to eliminate some documents presumably
12 from this discussion at all and it will help us to identify
13 those documents that we're most concerned about for Your Honor
14 to review.

15 MR. LEVY: Your Honor, if I can be heard.

16 THE COURT: Hold on. So how would you go about
17 identifying or how do we categorize what those documents are?
18 Are you talking about for the ones that -- you're going to get
19 list serve lists of people. That's separate from what you're
20 talking about now which is the subject matter of certain
21 documents. Which documents are we talking about?

22 MS. DERMODY: So certainly we want that for the list
23 serve documents. Documents that are line cc'd to an attorney.
24 That to me strikes me as a huge question mark.

25 THE COURT: We're not going to do it for every

1 single one. I need -- if there's just some way to sort of
2 again test the waters with where you can say you know what,
3 why don't you give us the subject matter for every document
4 that's under this category or in this whatever.

5 MS. DERMODY: Okay. I'll give it to Your Honor.

6 MR. LEVY: Your Honor --

7 MS. DERMODY: I think there's 400 or so documents
8 that are copied to list serves.

9 THE COURT: Okay.

10 MS. DERMODY: So that's a very finite number of
11 documents.

12 THE COURT: 400 documents.

13 MS. DERMODY: Yes, roughly 400 documents. There are
14 documents that are blind copying attorneys that is not even
15 100 documents.

16 MR. LEVY: Your Honor --

17 THE COURT: Hold on.

18 MS. DERMODY: Less than 100 documents. Less than 10
19 documents. Just blind copying. Attorneys aren't -- on the
20 face they're blind cc'd. Very questionable to us. Then there
21 are documents where on the communications are either between
22 non attorneys, non attorney to non attorney, no attorney on
23 the document at all or documents that are to the marketing
24 department attorneys or PR attorneys which don't strike us
25 as --

1 THE COURT: They may not be but --

2 MS. DERMODY: If they're relevant documents in this
3 lawsuit and they're being copied to those people --

4 THE COURT: But the name of the game is we are going
5 to do some unofficial sampling essentially; right?

6 MS. DERMODY: Sampling, yes, but we can help you if
7 we know what the subjects are.

8 THE COURT: But I need -- I want to limit the number
9 of what we're talking about though. So again I'm trying to
10 find a way of saying maybe it's this one category or these two
11 categories but let me -- well, let me go over here because
12 there seems to be some concern.

13 MR. LEVY: I think plaintiffs have now started
14 litigating exactly the substantive privilege log issues in
15 which the parties have not yet conferred and they're taking
16 positions that are contrary to the local rules.

17 THE COURT: You know what though? We're not going
18 to just have it play out over time, over time, over time.
19 This has been an issue that's been around. Goldman had made a
20 commitment that they were going to undertake a process that
21 was going to provide list serve information. There is 8,500
22 documents at least on a privilege log. I want to see some of
23 those and assess what I think of what's been logged.
24 Depending on that it may result in having to do more work to
25 provide more information or it might be like this all seems

1 fine.

2 So in terms of the list serves, we were going to
3 identify a certain number that you are going to provide to
4 Goldman and I think -- I arrived at the number of 10 total,
5 not 10 over different points of time but just 10 total. So
6 you can pick this point in time for this one, this point in
7 time for another one. Pick 10 list serves.

8 Then on the subject matter documents -- on the
9 subject line help me narrow it down. What are you thinking
10 of?

11 MS. DERMODY: I'm sorry, Your Honor. So you had
12 said 25 list serves. Have you modified --

13 THE COURT: Did I say --

14 MS. DERMODY: Yes, you did.

15 THE COURT: Let's start with 10. Let's start 10. I
16 want to understand what we're talking about. Let's start with
17 10.

18 MS. DERMODY: So these are documents -- just to make
19 sure we know what the process is. These are documents you'd
20 like us to identify for Your Honor to take a look at.

21 THE COURT: So there are three things. One, they're
22 going to provide list serves to you.

23 MS. DERMODY: Sorry.

24 THE COURT: Information to you. For me, I want you
25 to identify 50 documents. Maybe you'll just pick them at

1 random. Maybe you have some other way of picking it that
2 they'll have to produce to me in camera for me to take a look
3 at and eyeball.

4 Then there are -- there's going to be a certain
5 number of documents separate and apart from that from which
6 you identify subject matter that you want the re line for.
7 The question is making that a reasonable number.

8 MR. LEVY: Your Honor, Local Civil Rule 26.2 as you
9 noted before expressly permits categorical logs.

10 THE COURT: It does.

11 MR. LEVY: And --

12 THE COURT: It doesn't mean it can be abuse though.
13 So we have to see if it's been used properly or not.

14 MR. LEVY: Of course. And 26.2(a) sets out the
15 specific fields that should be included in a privilege log and
16 the subject line is not one of them.

17 THE COURT: The subject matter of the document is.
18 And often --

19 MR. LEVY: The general subject matter of the
20 document is provided for every single document.

21 THE COURT: What are some examples of general
22 subject matter that's been described?

23 MR. LEVY: Sure. So there are subjects like reflect
24 legal advice regarding manager core tiling --

25 THE COURT: Right. So what does that tell them

1 about what was exactly provided? That's actually the claim of
2 privilege. In my history I did an incredible amount of
3 privilege log work in my early years and there were very easy
4 ways to have information that just doesn't tell you enough.
5 It's not that anyone is purposely doing that. Doing privilege
6 logs are hard and a pain. But to really assess what is at
7 stake you have to have an understanding of what that document
8 is talking about. It doesn't mean a paragraph description but
9 it means a re line essentially of what is being discussed in
10 there. To say it's attorney advice is just really a
11 restatement of the privilege.

12 MR. LEVY: Sure. And our descriptions don't just
13 say attorney advice. They do specifically describe like
14 manager core tiling or 360 reviews, what the -- they say
15 reflects attorney's advice regarding manager core tiling,
16 regarding 360 reviews, general subject matter.

17 THE COURT: That's why I want to limit them to
18 taking some number of documents they think they don't have
19 adequate -- a name for or identifying information. I'm sorry.
20 About the subject. It may turn out that they really shouldn't
21 have any more and that what they have is enough.

22 But I'm going to say 200 documents. Just let's see
23 what the re lines are. If there are any of those that Goldman
24 thinks that themselves communicate privileged information you
25 can call that out and I'll look at it in camera.

1 When can we do all this by? Ms. Dermody, you're
2 going to have to identify certain list serves, 50 documents
3 I'm going to look at and 200 documents for providing them the
4 re line.

5 MS. DERMODY: Are we going to have a chance to hear
6 from Goldman about what the list serves mean before we pick
7 the list serves?

8 THE COURT: If it's not clear what they mean I would
9 think so but what do you mean? So --

10 MS. DERMODY: What is gs@gs.com? Who does -- just
11 tell us who that is.

12 THE COURT: Is that a person or a list serve?

13 MS. DERMODY: It's a mailing list.

14 THE COURT: And you want to understand what is that
15 mailing list even if you don't know who the people are because
16 you want to know what you're asking for.

17 MS. DERMODY: Right.

18 THE COURT: And there are 160 and I -- is there any
19 problem with that, letting them know what the group really is?
20 Some of them may be obvious but some may not.

21 MR. LEVY: I think it's going to depend on the
22 specific document and I think if plaintiffs have a question
23 about a document they've now gotten 10 list serves that they
24 can ask about.

25 THE COURT: No, no.

1 MR. LEVY: And we'll look into those.

2 THE COURT: No, no. I'm asking -- this is for the
3 160 different list serves just what does the name of the list
4 serve mean. So who -- what is that -- how hard is that?

5 MR. LEVY: I think for the ones that are obvious on
6 their face then sure, if plaintiffs want to ask what 2006
7 diversity task force means we're happy to tell them.

8 THE COURT: What about the ones that aren't obvious?
9 Isn't that the most important for them to understand?

10 MR. LEVY: And in those it might vary by document.
11 So I think it's not necessarily going to be as straight
12 forward.

13 THE COURT: This is like providing a code of what
14 goes across a spreadsheet. You can provide 160 descriptors of
15 what those mean. GS, does it mean all of Goldman Sachs. Does
16 it mean a certain committee. It's a reasonable request. So
17 I'm going to order that that be done.

18 So that needs to be done before your choices are
19 made. So --

20 MS. DERMODY: We could file that by a week, Your
21 Honor. We just need to know what that is before we can apply
22 it.

23 THE COURT: Right. So I will order that that
24 information about the 160 descriptors be provided within a
25 week. That is two days before Thanksgiving. That's 11/26.

1 One day before Thanksgiving. One day. It's 11/26.

2 Then, Ms. Dermody, how long for you to turn around
3 and identify documents?

4 MS. DERMODY: Can we have seven business days? So
5 not including Thanksgiving.

6 THE COURT: Yes.

7 MS. DERMODY: Thank you.

8 THE COURT: Then for Goldman to provide the
9 information in response to that. Can we say a week?

10 MR. LEVY: When you say the information in response
11 to that, do you mean the identities of the numbers of the list
12 serves?

13 THE COURT: It's providing the -- no, no, no. I'm
14 sorry. The identities of --

15 MR. LEVY: All of the numbers of those 10 specific
16 list serves.

17 THE COURT: Yes --

18 MR. LEVY: That I'm sure will take more than a week.

19 THE COURT: Okay. So there's that and then there's
20 the specific documents, the 250. So for the list serves how
21 long would you need?

22 MR. LEVY: On that I -- I have to talk to the IT
23 personnel and get back to the Court.

24 THE COURT: No. You're going to tell me now.

25 MR. LEVY: How about --

1 THE COURT: If it turns out from your IT people that
2 it is not practically capable of doing that you can get back
3 to me but I don't want to leave it open ended. That's all.

4 MR. LEVY: Sure. How about three weeks?

5 THE COURT: Fine. That's for the list serve info
6 other than the designators.

7 Then at that point -- I've lost track. There's
8 something that has to happen after that. They're going to
9 provide the documents within a week and they're going to
10 provide the list serve list within three weeks.

11 So then plaintiffs are going to identify anything
12 after that or no?

13 MS. DERMODY: I think I've lost the thread, Your
14 Honor. So we're identifying 10 list serves to them that are
15 suspicious to us.

16 THE COURT: Right. And then they're going to
17 provide that -- okay, fine. Then we don't need to account for
18 anything after that.

19 In terms of getting me the documents, that's within
20 the seven days.

21 MS. DERMODY: Then maybe a week after that is when
22 we give you the list of 50 because that might include some of
23 those list serves.

24 THE COURT: I see. So documents for my review and
25 whatnot will be a certain time after that three weeks. How

1 long do you need?

2 MS. DERMODY: I think a week, Your Honor, would be
3 the most.

4 THE COURT: Okay.

5 MS. DERMODY: Where are we now? Is that Christmas?
6 We have all the holidays coming up.

7 THE COURT: I know. Is there anything else we need
8 to identify there in terms of the timing?

9 (No response.)

10 THE COURT: I think we put that one to bed and if we
11 spend the same amount of time on the other issues we'll only
12 be out of here by nine or ten; right?

13 MS. DERMODY: Your Honor, I guess we just would ask
14 for the Court's instruction because we're going through a meet
15 and confer process on the specific things doesn't mean we
16 can't ask questions about the privilege logs otherwise.

17 THE COURT: Of course not. You still have the meet
18 and confer on issues.

19 MS. DERMODY: Thank you.

20 THE COURT: Of course. Named plaintiff supervisory
21 discovery. There's a disagreement about the number of
22 supervisors. I have a question that no one put -- I may have
23 overlooked. It may be in there. What's the legal definition
24 of supervisor? I'm going to start with the plaintiffs.

25 MS. DERMODY: Well, I think we certainly could say

1 that anyone that controlled the circumstances of their
2 employment, that reviewed them, bonused them, promoted them,
3 are going to promote them. Those would be the basics.

4 THE COURT: Yes, but -- there can be a lot of people
5 involved in that.

6 MS. DERMODY: One of the fallback proposals we made,
7 Your Honor, is to at least include all the people that have
8 been identified as supervisors or co-supervisors of the
9 plaintiffs by Goldman itself.

10 THE COURT: Okay.

11 MS. DERMODY: It would seem to be categorically
12 their supervisors under Goldman's nomenclature.

13 THE COURT: How many people is that?

14 MS. DERMODY: I believe that is 30.

15 THE COURT: All right. Goldman, why isn't that a
16 reasonable --

17 MS. DERMODY: 31, Your Honor. I'm sorry.

18 THE COURT: 31. Why isn't that a reasonable request
19 if you've identified them as supervisors or such?

20 MS. DAVIDOFF: Your Honor, in response -- Amanda
21 Davidoff from Sullivan & Cromwell.

22 THE COURT: Yes.

23 MS. DAVIDOFF: In response to your question about
24 what's the legal definition of supervisor, I think the answer
25 is that it's the person to whom you report. The people who

1 make tangible employment decisions about you. It's not very
2 person who reviews you or has some input into whether you get
3 promoted.

4 THE COURT: Aren't there people who can make a
5 decision about you who you don't even interact with and
6 someone else is supervising your work?

7 MS. DAVIDOFF: People who make --

8 THE COURT: There can be people involved in an
9 employment decision behind the scenes in some ways. All
10 I'm -- I'm just trying to make the point that there are people
11 presumably who are literally supervising your work and that
12 may be -- it may be -- let's take a law firm. Right.

13 So you're a junior associate, who are your
14 supervisors? You're reporting to senior associates and you're
15 reporting to partners potentially. That's a multitude of
16 people for one person, isn't it?

17 MS. DAVIDOFF: Every firm is organized differently
18 but in corporations unlike law firms and Goldman Sachs in
19 particular each person does have someone to whom they report.

20 THE COURT: Right.

21 MS. DAVIDOFF: What we've been trying to do here --

22 THE COURT: But then why -- then isn't -- shouldn't
23 that be the only person giving a review then?

24 MS. DAVIDOFF: Well, so what we've been trying to
25 do, Your Honor, is to figure out -- how we figure out who's

1 the person who's reporting to you. Let me give you an example
2 from a law firm. Sometimes I am the deputy managing partner
3 of a litigation group. I frequently am in charge of giving
4 associates their reviews but there could be an associate who
5 is out of the office on the days I'm available to deliver a
6 review and in that case I'll designate a guest reviewer to
7 review them.

8 THE COURT: And you might review them and not
9 actually be their supervisor as well.

10 MS. DAVIDOFF: That may well be but my point is that
11 who gives you your review can sometimes be a matter of
12 convenience --

13 THE COURT: I agree.

14 MS. DAVIDOFF: -- just on the circumstances of the
15 case.

16 THE COURT: Right. I agree with that.

17 MS. DAVIDOFF: So we couldn't just go to some
18 automated space and say who are these people's supervisors but
19 likely we're talking about four people, four people about whom
20 we have a lot of information. What information do we have?
21 We have the people who are designated on their 360 reviews as
22 their primary managers. We took all of those people and said
23 those are your supervisors. That doesn't cover everyone
24 though because not every 360 review designates a primary
25 manager.

1 So then we went to the record and we asked ourselves
2 based on the record, based on people's testimony, based on
3 what we know from people internally and documents internally
4 that we have seen who actually supervised these people.

5 So to take a step back, plaintiffs started with a
6 list of 70 people. We wrote them a letter that explained that
7 many of these people were indifferent business units than them
8 or had been designated by them as comparators rather than
9 supervisors. There were a lot of problems with that list of
10 70 people.

11 We've now come back with a list of 18 people that
12 reflect the primary managers on the 360 reviews supplemented
13 with people we identified from the record as people who
14 actually supervised them. We haven't heard back from
15 plaintiffs on this list. That's where this stands. So it's a
16 classic unripe issue. I would love to hear why they think
17 there's delta between the 18 people we've identified and the
18 70 people they've identified needs to go up but we haven't
19 heard that from them.

20 THE COURT: Now we're talking about 18 and 31.

21 MS. DAVIDOFF: I don't know who the 31 are. They've
22 not provided that.

23 THE COURT: According to them, and we'll find out in
24 a minute, it's persons that Goldman has identified as
25 supervisors or -- what was the or?

1 MS. DERMODY: I think the terms are manager and co-
2 manager. That includes Geoffrey Needleman that defense
3 counsel represented to the Court in the context of comparator
4 discovery was actually Ms. Chen-Oster's supervisor but they
5 now don't have him on their list.

6 THE COURT: I understand. I made a note to myself
7 there seem to be some inconsistencies or mistakes on both
8 sides but we don't have to worry about that.

9 MS. DAVIDOFF: Your Honor, co-manager is the precise
10 field we identified as not a reliable indicator of somebody
11 who was a supervisor. We went to people at Goldman Sachs to
12 try to investigate this. Is this an indicator of who
13 supervised you and the answer is no. Primary manager on your
14 360, yes. Co-manager, no. It's just a field someone filled
15 in and it doesn't actually relate --

16 THE COURT: Wait, wait, wait. What does a co-
17 manager do? What is --

18 MS. DAVIDOFF: That's what -- we are in the midst of
19 the meet and confer process. This is the first time we've
20 heard that co-manager is what they think is the key field.

21 THE COURT: All right.

22 MS. DAVIDOFF: This is a classic unripe issue but we
23 went to our -- to people within Goldman Sachs today to ask
24 that very question, what is this co-manager field, why are you
25 telling us that these people listed as co-managers are not the

1 right people. We're in the mist of conferring with them about
2 it.

3 MS. DERMODY: Your Honor, I think we're in the
4 upside down because we're trying to finish discovery and we
5 can't ever move anything along. What we started with was
6 okay, we're not working at Goldman but we know that our
7 clients were supervised and reviewed by a whole bunch of
8 people petals above them. We gave them the list of those
9 people and they said no, that's way too many. So we said
10 look, we'll just use Goldman's own terminology, manager or co-
11 manager. That's 31 people. And now they're saying no, that
12 doesn't really -- it doesn't really have meaning. It seems
13 like an appropriate compromise to use the term --

14 THE COURT: Just remind me what is it that's being
15 produced, what information for these people.

16 MS. DERMODY: Yes. This is the -- sorry. This is
17 the small set of documents that were 360 reviews, the cross
18 roughing notes and complaints.

19 THE COURT: Of the supervisors themselves?

20 MS. DERMODY: The supervisors. It's an incredibly
21 small collection of materials to begin with. Now we're
22 reducing it to these 31 people that for whatever reason
23 Goldman's records show they're managers or co-managers.

24 THE COURT: Okay. Go ahead, Ms. Davidoff.

25 MS. DAVIDOFF: If I may, Your Honor, .

1 THE COURT: Yes.

2 MS. DAVIDOFF: Again, this is the first time they've
3 raised the co-manager as the critical issue. We went to our
4 client this morning and said we'd like to understand what this
5 co-manager is and why we're not finding in the record that co-
6 managers are actual supervisors. This is not the way this is
7 supposed to work.

8 THE COURT: When you say you're not finding in the
9 record that they're actual supervisors, what do you mean by
10 that?

11 MS. DAVIDOFF: Because there's no indication that
12 somebody -- the people who are listed as primary managers
13 actually were supervising people. That's what they -- that's
14 what the plaintiffs said in their depositions. The people who
15 are the co-managers don't really appear anywhere in
16 relationship to these people. So we went back to the company
17 and said why are they listed as co-managers, how do you get to
18 be listed as co-manager on a 360. I'd love to be in a
19 position to tell you today what the answer to that question is
20 but I'm not because we're hearing this for the first time.

21 MS. DERMODY: Your Honor, just respectfully, how can
22 it be the first time if it's on Page 6 of the joint status
23 report? Goldman listed specifically co-managers. I'm not
24 sure why this is the first time we're talking about this when
25 in fact it's been --

1 MS. DAVIDOFF: Because there was a list --

2 THE COURT: One at a time.

3 MS. DERMODY: So regardless, just to move the
4 process along we're talking about three categories of
5 documents with a discrete number of people. We started out
6 between 18 and 72. Now we're at 31 as a compromise using
7 Goldman's own statements. We can't verify what they're saying
8 about whether the people were co-managers. We just look at
9 the documents and say that's the information that Goldman self
10 designated.

11 THE COURT: I'm going to order --

12 MS. DAVIDOFF: 31 is not in the status report, Your
13 Honor.

14 THE COURT: There was not a 31 but I'm going to
15 order that that be produced. It's a small -- I agree that
16 it's a relatively small universe of documents and this isn't
17 an issue of what ultimately comes in a trial. A lot of this
18 may end up proving to be irrelevant but I'm going to order
19 that the 31 be produced.

20 MS. DAVIDOFF: Your Honor, may I ask that the Court
21 clarify that this is not a holding, that those 31 individuals
22 are in fact --

23 THE COURT: No. Absolutely -- agreed, it is not.
24 This is simply ordering the discovery and where it leads I
25 don't know but the Court agrees that this is not a holding in

1 any way that those people necessarily are supervised.

2 MS. DAVIDOFF: Thank you.

3 THE COURT: Withheld password protected documents.

4 A lot has been produced. It seems like according to whatever
5 statistics are run there's something like 2,296 documents or
6 some sort that haven't been located because of this password
7 problem. Goldman says it's going to be a huge manual effort
8 to do what's being asked. I do not fully comprehend what that
9 effort is and exactly the extent of what is being asked for.
10 I didn't quite understand the process that plaintiffs were
11 proposing be done.

12 So help me understand why -- what plaintiffs thinks
13 is involved in having this done and what it's going to yield.

14 MR. STROMBERG: Your Honor, this is Dan Stromberg on
15 the phone.

16 THE COURT: Hello.

17 MR. STROMBERG: So this process just to explain kind
18 of the situation that we're -- that we've run into and the
19 process the plaintiffs envision. Obviously a lot of papers, a
20 lot of ESI parties come across -- producing parties come
21 across password protected documents and there's some sort of
22 process in place to access those -- the documents that are
23 reasonably accessible within that population and search and
24 produce as necessary. In this situation what we have
25 identified -- plaintiffs identified a lot of documents that

1 were produced as slip sheets and then defendants further
2 clarified that those were password protected in addition to
3 some other categories of documents that are -- that didn't
4 process correctly and we're not talking about those today.

5 So for those password protected documents it was
6 understood or was explained by defendants that their process
7 for attempting to un-password protect documents in order to
8 search and produce was -- there's a master sheet of Goldman
9 common passwords that are applied across the whole universe
10 and when they work they encrypt the document and it's able to
11 be searched and produced.

12 Additionally, as their review went forward and the
13 reviewers identified passwords to I guess providers or some
14 supervising attorney those passwords would be added to that
15 master list and those passwords would then unlock password
16 protected documents in the universe of documents.

17 However, plaintiff's review of documents and
18 actually I should say a very simple search of documents where
19 we don't have -- all we have are documents -- for password
20 protected documents all that plaintiff have are password
21 protected documents that are part of families or attached to
22 otherwise relevant non privileged documents. So it's a small
23 subset and we don't have metadata identifying okay, these are
24 the password protected documents versus other problems
25 although now we have -- we subsequently have a log that

1 identifies some of those but -- so with their limited set of
2 documents from defendant we were able to identify a whole host
3 of passwords pretty easily with limited searches just
4 searching the text.

5 We identified back in the spring I believe examples.
6 We just give exemplars. Here are four examples and we think
7 these examples show that the process being utilized by Goldman
8 is insufficient. Goldman has since produced those four
9 documents along with some others but we can easily and we've
10 sent to -- we recently sent a list of 150 emails that we
11 easily identified as containing passwords for password
12 protected documents again in the production set.

13 So we are not asking Goldman to go review the 2,636
14 documents that were password protected. What we're asking
15 them to do is instead of just relying on a really passive
16 process where reviewers apparently sometimes identify
17 passwords when they find them and sometimes they don't we in
18 addition to applying the passwords that we identified, the
19 plaintiffs identified, we would like Goldman to search the
20 parent emails of those 2,636 documents for passwords. When I
21 say search I mean run some searches and we can provide some
22 guidance on what those searches should be similar to what we
23 ran of the [inaudible].

24 Based on the -- we don't know what subset of the
25 2,600 that's going to be. Presumably a few hundred. I don't

1 know. Not a huge list. Identify the passwords in those
2 emails. Not only apply them to the attachments but also --
3 I'm sorry. Not only apply them to those documents that
4 they've produced as slip sheets or password protected but also
5 apply those passwords to document families that weren't
6 produced because they're identified as not relevant -- sorry.
7 That were reviewed because they hit on search terms elsewhere
8 in the family but these -- the whole family is identified as
9 not relevant but these documents weren't reviewed because they
10 were password protected.

11 Then additionally in the entire population -- so
12 millions of documents that weren't reviewed at all because
13 they didn't hit on search terms, we're not asking Goldman to
14 go review all of those obviously. We're asking for the finite
15 number of passwords that have -- that would be identified by
16 this process to be applied to that universe and see if any of
17 those documents hit on search terms.

18 So there are I would argue additional categories of
19 reasonably accessible passwords that they can find but -- and
20 we've talked about it with Goldman and they're not willing to
21 look into them without specific identification. That category
22 would be emails that say use this -- something like this
23 department's password for fall 2008 for example or our usual
24 password or password coming in a second email. Those would
25 all be I would argue are reasonably accessible. However,

1 we're not even asking for those. We're only asking for it
2 when the password is clearly visible in the cover email.
3 We're asking those passwords to be located and applied to the
4 review.

5 THE COURT: How many documents are there in the
6 reviewed but not produced because not relevant?

7 MR. STROMBERG: So it looks like -- that's the
8 number. 2,636. We're asking for the search for passwords.
9 Basically look at the parent emails of those 2,636. Run a
10 search for password or PW or the like to identify -- I don't
11 know how many of the 2,636 contain passwords but that's the
12 entire population over which to run our search. So we're
13 basically asking for a proactive approach at all to identify
14 passwords rather than a passive approach whereby sometimes
15 reviewers report passwords that they find and obviously based
16 on our limited easy review -- or limited easy search and
17 review we found a lot of instances where that was not the
18 case.

19 THE COURT: Right. I may not have communicated this
20 well. My question is I thought you referred to once you find
21 the passwords you want them to then run them for all the
22 documents that we reviewed but not produced for reasons of
23 relevance. My question is what quantity of documents are we
24 talking about there.

25 MR. STROMBERG: Oh, that is the 2,636. So all -- we

1 don't know how many were reviewed because they didn't hit on
2 search firms because they had password protection.

3 THE COURT: All right. On the --

4 MR. STROMBERG: We -- what the -- where the -- where
5 the family was not produced because it wasn't relevant however
6 the password protected document was never reviewed, that's
7 2,636. 2,636 attachments are password protected, but they're
8 family hit on search terms and the review did not identify
9 them as relevant not privileged.

10 THE COURT: All right. Let me -- let me ask Goldman
11 to address this and what is it that so burns them about what's
12 being asked to be done.

13 MR. LEVY: Sure, Your Honor. And it does seem like
14 plaintiff's position may have shifted somewhat since the joint
15 status reports. And if what they'd only like us to review is
16 the parent emails for those 2,600 documents that would be
17 fine. There's a difference between doing that and
18 affirmatively running searches across millions of documents in
19 a review database of their choosing. If that's all they want
20 us to do is look at the parent emails of 2,000 documents
21 that's fine and we're happy to do that.

22 THE COURT: Yeah. It seemed to me like there may
23 have been ships passing in the night with different
24 understandings of what the scope of what involved was, but I'm
25 still not sure, so let me ask plaintiff. You just heard

1 defendant's understanding of what was being asked. Is that
2 what you're asking for?

3 MR. STROMBERG: Yes and no. We are asking for that,
4 but there would be, theoretically, additional steps based on
5 whatever additional passwords were identified in addition to
6 the passwords that we have identified for defendant. Whatever
7 additional passwords are identified out of the 2,600 those
8 passwords should be added to the master Goldman password data
9 that's applied to the universe of documents.

10 And anything that -- so in the cold set, so
11 everything that wasn't reviewed in the first place because it
12 never had a search term hit, if there's a search term hit now
13 because the password has been -- because the document's been
14 password cracked, if the search term hits and other search --
15 whatever search criteria are applied to the documents and they
16 now get pulled in they should be reviewed.

17 And even if a document in the 2,636 parent email
18 doesn't contain a password, but obviously the passwords
19 identify -- the passwords identified and whatever we found --
20 or whatever Goldman finds in the -- in its review and get --
21 those passwords get added to the master list. Anything that's
22 basically decrypted or unlocked should be reviewed and
23 produced as necessary.

24 THE COURT: All right. I'm still --

25 MR. STROMBERG: So yes, the review -- the search,

1 rather, not the review, the search is limited to the 2,636.
2 That's what we're asking. But any results of that search
3 should be applied as necessary across everything.

4 THE COURT: Applied as necessary to millions of
5 documents?

6 MR. STROMBERG: Potentially, just like any --

7 MR. LEVY: Any millions upon --

8 MR. STROMBERG: -- so it's not millions. We don't
9 know how many it is, but that's what -- how their process was
10 done with their master Goldman password list initially. They
11 applied those passwords to everything because you can't search
12 for text in documents that are password protected. But these
13 -- that's what should also be included on that list.

14 So, yeah, it's really a simple processing step where
15 it's applied to everything that was culled. If there are
16 additional -- we're not asking for them to review all of those
17 documents, but any search terms hits of the agreed upon search
18 terms that now exist because these documents have been
19 appropriately decrypted those should be reviewed because they
20 should've been reviewed originally.

21 THE COURT: All right. Let me -- Goldman please
22 attach --

23 MR. LEVY: Sure.

24 THE COURT: -- address again.

25 MR. LEVY: I don't think plaintiffs have accurately

1 described our password cracking process. And I -- and I think
2 it's important to remember that the legal standard for ESI
3 discovery is not perfection, it's reasonable and proportional.
4 And there's plenty of cases holding that.

5 So we started, as plaintiffs did accurately
6 describe, with a master password database. It contains all
7 passwords that have been identified at any point in this
8 litigation and in other litigations involving Goldman Sachs
9 amassed through Goldman Sachs database.

10 During the course of review we specifically
11 instructed and trained reviewers any time they saw a password
12 that got -- there was a process so that could get added to the
13 database. When that database was updated it would then be run
14 in an iterative fashion. So within the review population that
15 hit on the search terms we would run the updated master
16 password database and review any decrypted documents. And if
17 they were responsive we'd produce them and non-privileged,
18 we'd produce them.

19 We would also rerun the password database on the
20 documents that didn't hit on the search terms and so that in
21 case a document that was then decrypted hit on the search
22 terms. And throughout the course of the review as we
23 identified more password it was an iterative process and we
24 would run the password database again and again.

25 THE COURT: So it sounds like running the database

1 again as it changes over time is not that difficult?

2 MR. LEVY: Running the password database is not.

3 And we've -- and that's exactly the point because we've
4 already done all of that. What plaintiffs are asking us to do
5 now is to go back in and re-review the documents -- sorry --
6 that we've already reviewed, the documents that have already
7 been specifically searched through the search terms and
8 reviewers expressly instructed and trained to look for
9 passwords have already reviewed.

10 And plaintiffs' claim that they have identified
11 hundreds of additional passwords, that's not correct. They
12 sent us over a hundred emails containing passwords. Many of
13 those were the same passwords and most of those passwords we
14 had already identified. In fact, we've --

15 THE COURT: Already identified and run through?

16 MR. LEVY: We submitted those documents and if they
17 were responsive we produced them. We identified over 1,700
18 passwords. Plaintiffs identified 24 new passwords. That's
19 about one percent of additional passwords, which shows that
20 the process is, I think, by any measure reasonable and
21 proportional.

22 THE COURT: What would be so hard, then, about
23 running the 24?

24 MR. LEVY: We are currently running the 24 as we
25 speak and we will review any documents that are responsive and

1 non-privileged that are decrypted as a result of that.

2 THE COURT: So I think we don't have a dispute.

3 MR. LEVY: I think as to this issue we don't have a
4 dispute and Your Honor is absolutely right.

5 THE COURT: Okay, then.

6 MR. STROMBERG: Your Honor, that I -- respectfully,
7 that doesn't -- we are not just asking defendants to run the
8 passwords that we have identified. We're asking for a
9 proactive search of the 2,600 documents -- or the parents of
10 the 2,600 documents to identify additional passwords.

11 And while counsel may have said that their master
12 password list identified it -- I'm sorry, I don't know if it
13 was 17,000 or 1,700 passwords -- I don't believe that
14 reviewers identified 17,000 or 1,700 passwords. And I believe
15 what -- again, what plaintiff's counsel has easily found shows
16 the flaw in relying on reviewers to identify passwords.

17 And again, we're not asking for a re-review of
18 everything. We're asking for a simply search such as
19 plaintiffs used fairly easily to proactively identify
20 passwords in a really small subset of this -- of these
21 documents and apply them as necessary.

22 THE COURT: So -- but again --

23 MR. STROMBERG: And we're not asking for perfection
24 because I pointed out those other categories were
25 investigation could also uncover passwords, but we are not

1 asking for that. We're asking for simple searches of the
2 parent emails to the 2,636 documents.

3 THE COURT: And you're looking among those for
4 additional passwords that may not be known or have been used,
5 is that correct?

6 MR. STROMBERG: Correct.

7 THE COURT: Okay. And why is that so difficult
8 then? If you -- if you're running 24 new passwords now why
9 would it be so difficult to do this search of the 2,000
10 whatever documents and then run any unique passwords that
11 haven't already been run?

12 MR. LEVY: Sure. I think if plaintiffs are asking
13 that we look at the parent emails for these 2,000-some-odd
14 documents and run them within the review population, we're
15 happy to do that.

16 THE COURT: Good.

17 MR. LEVY: I think we would have an issue if they're
18 asking us to then -- I'd say they keep saying we're doing a
19 passive and not proactive search and I think that's incorrect
20 where we have search terms and reviewers were reviewing those
21 documents, which is essentially what plaintiffs are proposing
22 to run searches and then have reviewers review documents.

23 I think additional searches for passwords beyond
24 that is what we're not prepared to agree to. And running
25 passwords that on the tens of millions of documents that

1 didn't hit on any search terms in the hopes that they might
2 decrypt documents and they hit on the search terms, now we're
3 talking about another kind of large scale search and review.
4 But if what plaintiffs are asking for is look at these 2,000
5 documents, pull out any new passwords, run them within the
6 review population, we're happy to do that.

7 THE COURT: That's what we're --

8 MR. STROMBERG: May I, Your Honor?

9 THE COURT: Yes, last time.

10 MR. STROMBERG: So as counsel explained their
11 password decryption process up until this proposal they would
12 identify passwords, add it to the master list, and apply it to
13 all documents in the universe and review search terms hits as
14 necessary. We're simply saying they do this last step of
15 search these 2,600 documents to find more and apply it as
16 necessary to everything to -- so they are searching everything
17 and reviewing documents that hit on search term hits.

18 THE COURT: But is that what you've been doing with
19 the passwords, running them against the entire universe
20 including documents that didn't have hits previously and were
21 deemed not relevant?

22 MR. LEVY: We were running -- during the -- during
23 the ESI discovery we were running the updated master password
24 database within the review population which would decrypt
25 documents and in the larger population to ensure that any

1 documents that hit on the search terms were pulled in. So
2 that's already been done.

3 I think now ESI discovery ended on August 30th and
4 we -- and all of the -- and essentially all of the passwords
5 thus far have been identified and so we're happy to run
6 additional search terms within the review population. To then
7 be running additional searches across the tens and millions of
8 documents and be pulling them back in is, I think, another
9 round of ESI discovery would be disproportionate.

10 THE COURT: But what's involved in doing that? How
11 much time and effort?

12 MR. LEVY: Running this -- actually running the
13 processes --

14 THE COURT: Yeah.

15 MR. LEVY: -- is not the burdensome part, it will be
16 the actual review of now we're talking about potentially
17 thousands of documents.

18 THE COURT: Potentially thousands of relevant
19 documents?

20 MR. LEVY: It's not clear whether or not they're
21 relevant until we review them. And I would know that --

22 THE COURT: Right.

23 MR. LEVY: -- the types of documents that tend to
24 get decrypted are the most burdensome to review. They're very
25 large Excel files.

1 THE COURT: Okay.

2 MR. LEVY: They're the types of documents you tend
3 to see password protected.

4 THE COURT: All right. All right.

5 MR. LEVY: And one last point, Your Honor --

6 THE COURT: Okay.

7 MR. LEVY: -- if I may is that there's also
8 additional hosting costs. When you move files into an active
9 review database you have to pay to host them. And if you're
10 talking about large Excel files there is another attendant
11 burden and cost associated with that.

12 THE COURT: Yeah, Goldman can afford those hosting
13 costs I believe. The -- I'm not going to order a more wire
14 burdensome search. I think what Goldman has suggested as what
15 they are going to do is sufficient. It's as we've all agreed.
16 It's not perfect and there will be certain documents that
17 aren't caught, but there's no reason to believe that there
18 necessarily are documents among that search that will be
19 relevant or material. So --

20 MR. STROMBERG: Your Honor, can you clarify what
21 Goldman has agreed to do? I'm just unclear.

22 THE COURT: Why doesn't Goldman state it.

23 MR. STROMBERG: Thank you.

24 MR. LEVY: Sure. So we're prepared to review the
25 parent documents of these 2,000 specific some odd emails. And

1 then we'll run those within the review population and we'll
2 review any encrypted documents.

3 THE COURT: Okay. That's what they're doing. Court
4 ordered interrogatory that Goldman has not answered because
5 they are concerned about the fact that the judge asked --
6 phrased it in a loaded way that asked for less discriminatory.
7 And I will say in looking it over in retrospect I understand
8 their concern.

9 And so I have a question for really -- well, all of
10 you about whether the following question would work. Identify
11 any alternative to the three practices that Goldman considered
12 to achieve its business necessity and for which Goldman also
13 considered the impact on or treatment of men and women.

14 MR. KLEIN: Your Honor, just on that as a point of
15 information, there are essentially two different standards.

16 THE COURT: Okay.

17 MR. KLEIN: And I'm not sure it matters, but I just
18 wanted to point it out.

19 THE COURT: Yeah.

20 MR. KLEIN: So there's Title VII which as an
21 articulation of I'll call it the last discriminatory
22 alternative prong of essentially the burden of proof for
23 plaintiffs in this case. It's our affirmative burden. The
24 city statute however has a different articulation, which is
25 although the words are different they cover the same concepts,

1 but they change the burdens of proof.

2 And so, I'll just point that out in particular that
3 essentially under the city statute which covers the majority
4 of the class at issue in this case, if the covered entity
5 fails to prove that such alternative policy of practice would
6 not serve the covered entity as well, that becomes their
7 burden --

8 THE COURT: Right.

9 MR. KLEIN: -- not ours.

10 THE COURT: Right.

11 MR. KLEIN: So that makes a difference in the context
12 of framing the interrogatory. And I think it's hard to sort
13 of understand the differences as between those two statutes as
14 applied to the rod you just articulated. So I just -- I think
15 we just have to be sensitive to that difference in terms of
16 how the statute works. So there's a different burden of proof
17 --

18 THE COURT: Right.

19 MR. KLEIN: -- depending on which statute you're
20 talking about.

21 THE COURT: Okay. But are you suggesting that means
22 the question is not sufficient or that it is?

23 MR. KLEIN: So I just confirmed my client. I think
24 it's okay. You know, it's on the fly, so in terms of sort of
25 understanding exactly how that related to both statutes in the

1 way that it's articulated given the fact that we're just sort
2 of answering this in real time, I think -- I think it's -- I
3 think it would be okay.

4 THE COURT: All right. Give it thought and
5 hopefully you'll come -- well, let's see what Goldman thinks
6 of it.

7 MS. DAVIDOFF: Well, Your Honor, I think this is the
8 first time we've heard -- in a theme for today this is the
9 first time we've heard that they think that the answer to this
10 question is sort of different depending on whether you're
11 looking at the federal or the -- or the state burden of proof.
12 But I do think that there's a more fundamental problem here
13 which is that the interrogatory is fundamentally trying to get
14 -- plaintiffs are trying to get at whether -- get Goldman to
15 identify less discriminatory alternatives that would've met
16 its business needs that it considered.

17 Why is that a problem? Well, because it does
18 reverse the burdens under Title VII. And as Your Honor has
19 recognized, you know, some of the information that will come
20 in on these business necessity and less discriminatory
21 alternatives issues is a matter of expert opinion and also,
22 you know, the way we've set up the expert reports. You know,
23 people are going first depending on what their burden of proof
24 is.

25 So Goldman will go first on business necessity,

1 plaintiffs will go first on other issues. Plaintiff's burden
2 here, and it's always their burden, is to identify
3 alternatives that they consider less discriminatory and that
4 would've met business needs and to prove that Goldman Sachs
5 should've adopted them and didn't.

6 So that's their burden. Under Title VII that's
7 where that burden lies. They start by making a prima facie
8 case that there was a disparate impact. We can respond by
9 showing that the practice they're challenging met a business
10 necessity. And they can reply by showing that there was a
11 less discriminatory alternative that also would've met that
12 business necessity and that we refused to adopt.

13 This interrogatory puts the cart before the horse
14 because it asks us to identify alternatives we considered that
15 met business necessity, right. The way Your Honor is phrasing
16 it now is quite similar to that same problem of putting the
17 burden on Goldman to identify alternatives that were
18 considered that met business necessity and that would've been
19 less discriminatory, but it's plaintiffs who have to do that
20 in the first instance.

21 If Your Honor wants us to serve an interrogatory on
22 them that says, you know, identify the alternatives you
23 contend are less discriminatory and would have met our
24 business needs that we should've considered, you know, they
25 could answer that interrogatory and then we could answer the

1 interrogatory of whether we considered them. But it's never
2 our burden to identify the less discriminatory alternatives,
3 it's their burden.

4 THE COURT: Okay. It doesn't mean an interrogatory
5 is not proper to be answered though.

6 MS. DAVIDOFF: Well, I'm --

7 THE COURT: I mean again it's a position, but even
8 more fundamentally it sounds like plaintiffs are saying, at
9 least as you have found out in this moment, that they have a
10 view that their burdens are different under the two statutes.

11 MS. DAVIDOFF: It may be right for meeting and
12 conferring about that. I don't quite understand the argument
13 they're making about this --

14 THE COURT: Okay.

15 MS. DAVIDOFF: -- in terms of the burdens being
16 different.

17 THE COURT: But regardless of that whoever has the
18 burden, why isn't it sufficient to be able to answer, identify
19 any alternative to the three practices Goldman considered to
20 achieve its business necessity and for which Goldman also
21 considered the comparative impact on or treatment of men and
22 women. That's just to identify what alternative practices, if
23 any, were considered. Was there something other than
24 quartiling? Was there something other than the 360 review?
25 Was the -- to me that's what it's asking for.

1 MR. KLEIN: And, Your Honor, just on that point --

2 THE COURT: Yeah.

3 MR. KLEIN: -- if I could mention this. It's likely
4 that they'll move for summary judgment or that one of the
5 parties may move for summary judgment. So we're not even --
6 so at that point, right, it's a question of whether the
7 parties can establish that there are material issues of fact
8 that would not be susceptible to summary resolution.

9 THE COURT: Right.

10 MR. KLEIN: And, so we're entitled to discovery --

11 THE COURT: Yes.

12 MR. KLEIN: -- whatever they think of their merits.

13 THE COURT: That's exactly my point that this is
14 just asking for information and it's not --

15 MR. KLEIN: That's right.

16 THE COURT: -- phrased in a sort of leading way, if
17 you will. It's just saying what alternatives, if any, did you
18 consider?

19 MS. DAVIDOFF: There's something built in here which
20 is identify any alternative that Goldman Sachs considered to
21 achieve its business necessity.

22 THE COURT: Well, because I don't know what your
23 business necessity is, so.

24 MS. DAVIDOFF: Right. But that build -- and Your
25 Honor last time ruled that we didn't have to answer the

1 interrogatory about business necessity because that's a matter
2 of expert discovery and that would come later. And so --

3 THE COURT: But this is a different question.

4 MS. DAVIDOFF: But we would have -- be having to
5 sort of assess the question of business necessity at this time
6 then.

7 THE COURT: Well, to me this -- if your -- I assume
8 the business necessity was to have quality and effective
9 evaluation systems and promotion systems, et cetera, and here
10 are the systems you considered to do it. And that's
11 really -- isn't that what this is getting at? That's what I
12 think it's getting at. I'm not sure what you're concerned
13 about.

14 Your business necessity was -- surely you can
15 identify your own business necessity. What were you trying to
16 achieve? What was the business necessity you were even having
17 these practices in place for? So I think it can be answered,
18 so I'm going to require that it be answered --

19 MS. DAVIDOFF: Okay.

20 THE COURT: -- in that fashion.

21 MS. DAVIDOFF: Thank you, Your Honor.

22 THE COURT: All right. There are two remaining --
23 no, there are three -- there are -- oh, there are four. Okay.
24 So discovery extension and trial plan. And the reason -- I
25 don't know if they really interact with each other too much.

1 I will tell you on the discovery extension I have no problem
2 with an extension of discovery.

3 I never do open-ended discovery extensions, so I'm
4 not going to do three months from the time Goldman finishes X.
5 I'm happy to issue right now a four month extension. If for
6 some reason there's an essential need later on we can address
7 it then, but hopefully there will be no more.

8 MR. GIUFFRA: Thank you.

9 THE COURT: And let's see. All right. That takes
10 us to -- oh, and in terms of new discovery requests in my mind
11 you're always allowed to issue new requests that stem from new
12 information you've received via through new documents or
13 depositions. So I'm not going to say you can't issue new
14 requests. Of course, if it's more new stuff that you could've
15 asked earlier and isn't based on new information that's a
16 different story.

17 All right. Trial planning. Oh, Mr. Giuffra, you're
18 going to get some answers.

19 MS. DERMODY: I'm sorry, Your Honor.

20 THE COURT: I guess I'm not --

21 MS. DERMODY: Just on the last comment you made --
22 I'm sorry to interrupt you --

23 THE COURT: Yeah. Please go ahead.

24 MS. DERMODY: -- counsel. Just in terms of the new
25 discovery piece --

1 THE COURT: Yeah.

2 MS. DERMODY: -- philosophically we don't disagree,
3 but there's one little issue which is depositions. So we've
4 been trying to identify -- you know, we have like a big list
5 of key witnesses. We're trying to narrow that down. It's
6 informed by documents, obviously, and we're still getting
7 documents produced. We're still fighting over some documents.

8 THE COURT: Right.

9 MS. DERMODY: So we might end up noticing a bunch of
10 depositions, you know, into the new discovery period. It's
11 because of the work we're doing now to actually --

12 THE COURT: Right.

13 MS. DERMODY: -- identify them, but it will be a new
14 notice to them, but it's work stemming from this period.

15 THE COURT: Yeah.

16 MS. DERMODY: So I just want to make sure that when
17 we start noticing depositions in January we don't hear that
18 it's too late.

19 THE COURT: That concept that you just described is
20 fine.

21 MS. DERMODY: Okay. Thank you, Your Honor.

22 THE COURT: All right. So trial planning, phase one
23 versus phase two. I can answer this partially and then I can
24 tell you what won't be answered now. So phase one will
25 include the liability on a classwide basis for discriminatory

1 treatment and impact caused by or associated with the three
2 processes which served as the basis for class certification,
3 i.e. quartiling, 360 reviews, and cross-ruffing.

4 Phase one will not include individual plaintiff
5 claims and defenses apart from application of the three
6 processes, will not include any boys club incidents, rather
7 only anecdotes for phase one will be those related to the
8 application and effect of the three processes.

9 And I just want to note on the boys club evidence of
10 course in the individual parts of this it's still possible
11 that, and maybe even likely, that boys club evidence might
12 come in for someone's individual claims. They obviously have
13 claims about things that happened to them, but that's all the
14 more reason why it's not going to be done in phase one.
15 Damages and back pay, whether classwide or individual, also
16 not phase one, punitive damages, not phase one.

17 Other issues that I'm about to list are premature
18 and will be subject to expert reports, summary judgment,
19 motions in limine, and Judge Torres's pre-trial filings.
20 These include, among others, admissibility of non named class
21 member evidence, relevance and admissibility of comparators,
22 post 2016 process changes, how plaintiffs will prove
23 causation, and availability of injunctive relief in the
24 absence of certified class under 23(b)(2). Questions?

25 MS. DERMODY: Yeah, Your Honor. So I'll start with

1 the named plaintiffs role in the phase one trial. So as I
2 understand what Your Honor has said they will have a role.
3 They will be able to testify --

4 THE COURT: Yep.

5 MS. DERMODY: -- as to the application of the
6 processes to them?

7 THE COURT: Yes.

8 MS. DERMODY: Okay. And then, Your Honor, in terms
9 of the back pay piece of it --

10 THE COURT: Yes.

11 MS. DERMODY: -- so when phase one is trying the
12 disparate impact claims as to processes from which experts can
13 derive a back pay number you will not have that back pay
14 number submitted to Judge Torres for her consideration?

15 THE COURT: So -- well -- okay. So the concern
16 there was why isn't back pay different for different
17 individuals? How can that be determined on a classwide basis?
18 Isn't it going to depend on what that person's position was
19 and what their situation was, and what is their individual
20 back pay? How is that determined on a classwide basis?

21 MS. DERMODY: Sure, Your Honor. So the way it's
22 been done in other cases is it's -- there's an aggregate back
23 pay award and then there's an allocation that happens --

24 THE COURT: But --

25 MS. DERMODY: -- subsequent. So it's --

1 THE COURT: -- what's it based on? What's that back
2 pay work --

3 MS. DERMODY: Because --

4 THE COURT: -- based on?

5 MS. DERMODY: Sorry, Your Honor.

6 THE COURT: No, no, go ahead. What's it based on?

7 MS. DERMODY: It's based on the fact that you're
8 talking about a neutral practice applied to the class from
9 which you can see through data analysis what is the impact on
10 a classwide basis. That won't tell you what the impact is on
11 an individual basis, class member to class member, but it will
12 tell you in the aggregate what the loss is to the class. And
13 then in the allocation of that is something that is -- that
14 can be done at a subsequent remedial stage in terms of an
15 allocation process.

16 So the only different there really isn't a
17 difference about the jury's consideration necessarily,
18 although I think under New York City law that there's a open
19 question. But certainly it's about whether the fact finder
20 allowed the disparate impact claim makes a finding as to both
21 liability and the back pay amount which can -- is the subject
22 of just, you know, an expert's report -- well, if it's
23 accepted. They'd have done a different expert's.

24 If there was a liability finding the court might
25 have a different assessment than our expert of what that

1 number is. But there would be expert analysis about that and
2 then the allocation, as I said, would be separate.

3 MR. GIUFFRA: Your Honor, can I be heard?

4 THE COURT: Of course.

5 MR. GIUFFRA: You know, my neck is spinning from
6 what's gone on in this issue. We had a hearing on December
7 20, 2018 and plaintiffs' counsel said no damages at phase one.
8 We had an order from Judge Torres October 7, individualized
9 issues such as damages will be separately considered phase
10 two.

11 Now, Your Honor just said damages is not in phase
12 one including back pay. And we've laid out in some detail
13 while under Wal-Mart. You can't get back pay in phase one
14 plus there had been amendments to Title VII that have talked
15 about individualized ascertainment of damages.

16 We need to obviously know what's in phase one. So
17 we appreciate Your Honor's order and this just has to end. No
18 back pay, no punitive damages, no computerized generated
19 numbers, nothing running around to a jury about, you know,
20 with some big judgment. It's all going to be done in phase
21 two.

22 That's what the law is. It's not -- maybe in some
23 case in 2011 or 1965 or 1985 or 19-you know-95, but in this
24 case with the law that currently exists no damages in phase
25 one. And I think we just need to be clear about it because we

1 need to sort of put this issue to the side.

2 As I understood what Judge Torres did in class
3 certification it was about presumption shifting. But it's --
4 the cases are going to be litigated in phase two on an
5 individualized basis, not in some, you know, aggregate award
6 that Mr. Dermody, you know, would like to get that's generated
7 by some computer.

8 And it wouldn't -- it would not apply in this kind
9 of a case anyway. It's not a test case where someone took a
10 test and, you know, they either did or didn't get a job. It's
11 a very complicated situation and from beginning of the case
12 they have wanted to get something they're not entitled to and
13 we need to put an end to it.

14 MS. DERMODY: Your Honor, if I could, there's been a
15 lot made of a comment that my colleague, Ms. Geman, made in a
16 hearing about damages. And I think the confusion comes from
17 the fact that disparate treatment talks about damages and
18 disparate impact talks about back pay. And we have never
19 contended that disparate treatment damages would be tried in a
20 phase one of any class trial. We agree completely with Mr.
21 Giuffra. So we have one thing in agreement.

22 What we disagree about the placement of disparate
23 impact back pay findings. And so we believe that there hasn't
24 been a case that has deferred those into a phase two. It
25 doesn't make any sense to do that. The allocation is

1 something that could be continued after the liability and back
2 pay finding is made. But those things traditionally have
3 always been done in one class trial and Wal-Mart says nothing
4 about that. It doesn't -- it didn't change Title VII.

5 THE COURT: Yeah, but in those cases did they have
6 separate phase two for individual claims?

7 MS. DERMODY: Yes, if they were disparate treatment
8 cases. Yes. That's the teamsters model which is when you
9 have a case involving those types of damages then, yes, you
10 have a subsequent -- a phase two. And I think that that makes
11 sense when you're talking about things like compensatory
12 damages or, you know, issues of hostile work environment at
13 large not when you're talking about whether you were paid the
14 same as the person next to you with the objective
15 characteristics.

16 MR. GIUFFRA: Your Honor, I mean, this has got to
17 end. I mean I think you've entered an order that says back
18 pay, punitive damages, compensatory damages all goes into
19 phase two including for the named plaintiffs because otherwise
20 this will never end. And --

21 THE COURT: What will never end?

22 MR. GIUFFRA: Well, we won't know -- we won't know
23 what's going to happen in phase one trial.

24 THE COURT: Oh, I'm sorry. Okay. I thought you
25 meant -- yeah.

1 MR. GIUFFRA: As I understood the whole purpose of
2 phase one trial it was going to be about -- it was going to be
3 about burden shifting. That was the purpose of it. As I
4 understand the teamster's process and I understand what was
5 happening here if there's a disparate impact shown, then if we
6 try the case against Ms. Chen-Oster in phase two she gets a
7 presumption of 50.1 percent and then we'd litigate the
8 question as to whether the process was applied against her in
9 her particular circumstances in a -- in a way that was -- had
10 some disparate impact on her and it was disparate treatment.
11 And that would all get dealt with in individualized
12 proceeding.

13 What they are looking for is something they're not
14 entitled to and it needs to end. You know, one point of
15 clarification. Again, phase one is not about liability being
16 determined on a classwide basis. It's about burden shifting.
17 Because under Title VII that's all that can be done in a phase
18 one trial in a disparate impact case.

19 You can't have liability findings. If they want to
20 claim that there are let's brief it. It's like many things in
21 this case. I mean we have -- you know, we put in an appendix
22 listing all the different changes of positions by the
23 plaintiffs, what they sought of class certification, what they
24 sought midway through the case, and at some point it needs to
25 end.

1 And, you know, candidly I think they're just going
2 to keep coming back, keep coming back trying to get something
3 they're not entitled to and that's why we've asked for this
4 order. I think we just got the order, but even then, you
5 know, we're getting re-argument on the order.

6 THE COURT: Well, we're discussing it.

7 MS. DERMODY: That's funny. Yeah, I would say
8 everything that Mr. Giuffra has said about the phasing of a
9 class trial and a Title VII disparate impact is reversible
10 error. It's wrong. It's just dead wrong.

11 MR. GIUFFRA: Well --

12 MS. DERMODY: And, so there's not going to be a
13 phase one that gives a presumption to 3,000 women to come in
14 with a presumption in phase two. No, there's going to be a
15 class liability finding about the policies and there's going
16 to be a back pay award. And then phase two is going to be
17 about the entitlement under disparate treatment analysis of
18 women with individual defenses raised by Goldman. That is
19 Title VII. That's what -- that's what Judge Torres laid in
20 the class cert. order.

21 THE COURT: Yeah. Don't worry. In terms of that
22 issue of is it just a shifting burden or is it full liability
23 on impact that'll be something determined by Judge Torres when
24 it comes time for pre-trial filings or post trial. My
25 question for you, Ms. Dermody, is in terms of back pay, and I

1 think you said there'll be experts which of course I would
2 assume there would be, but will it be purely essentially the
3 expert testimony and reports that determines what the back pay
4 is?

5 MS. DERMODY: Yes, Your Honor. It'll be -- we would
6 look at their own compensation database. We would run a
7 regression analysis just like the model to show commonality
8 about.

9 THE COURT: Okay. No, you've answered --

10 MS. DERMODY: And it's applied to the amount of
11 money it's made and the amount of money it's lost --

12 THE COURT: Right.

13 MS. DERMODY: -- and that gives you a number.

14 THE COURT: Okay. But that can just as easily be
15 done at phase one or phase two. I understand it has been done
16 many a time while the jury is out and the -- a judge is
17 considering it. I will -- on that particular issue I'm just
18 going to go back. I know you don't want me to. I'm not
19 changing it right now. I do want to think about it for a day
20 or two and I actually -- I do want to run that one by Judge
21 Torres, so.

22 MR. GIUFFRA: Your Honor, could I just be heard for
23 one second?

24 THE COURT: Yeah, you can be heard. Sure.

25 MR. GIUFFRA: Look, this is an important issue.

1 THE COURT: Yeah.

2 MR. GIUFFRA: It needs to be addressed and we
3 actually proposed doing was to brief the issue, but, Your
4 Honor, if you look at Wal-Mart at Page 564,366 it says that
5 the employer is entitled to an individual determination of
6 each employee's eligibility for back pay. What they want to
7 do is have some computer generate some number. There could be
8 people in this class who benefitted from the process --

9 THE COURT: I hope the experts are using computers
10 and not just doing it manually.

11 MR. GIUFFRA: I hope so too, but the point is,
12 number one, it needs to be resolved because we need to know
13 what the issues are at phase one.

14 THE COURT: Yeah, look, I don't think it's going to
15 change from what I said because not accepting that Wal-Mart is
16 everything, but just the general point that because there are
17 going to be very individualized claims here on damages it will
18 make sense to have back pay determined in connection with
19 that. Whether it gets done by -- and it'll -- you know,
20 you'll still be able to submit the expert reports and have it
21 considered at that time. That's really the only difference.

22 MS. DERMODY: Well, and, Your Honor, if I could just
23 say --

24 THE COURT: Yeah.

25 MS. DERMODY: -- I think that this an issue that

1 this particular issue of when the back pay award is decided
2 itself could be decided at trial because the expert analysis,
3 the merits reports they add three tables or two tables --

4 THE COURT: That's precisely why I just want to go
5 back on that issue and see if that's what may occur. But --

6 MR. GIUFFRA: Your Honor, we're open -- okay. Our
7 position is the Title VII amendments bar what they want to do.

8 THE COURT: Right. Right.

9 MR. GIUFFRA: And they can't cite a case post those
10 amendments, post Wal-Mart which does what they want to do.

11 THE COURT: Right.

12 MR. GIUFFRA: The case they cited was Novartis.
13 It's completely not on point.

14 THE COURT: Right. I'm not making a ruling on that.

15 MS. DERMODY: But, Your Honor, Title VII got amended
16 as to disparate treatment damages not as to disparate impact.

17 THE COURT: Okay.

18 MS. DERMODY: So Title -- I mean the riddle answers
19 itself.

20 THE COURT: But you all said it before which is --
21 well, and I said it. That is an issue that's going to be
22 decided by Judge Torres. You think it's not even appropriate.
23 But in terms of the individualized issue I am going to have to
24 have thought about just a little more and I will include it in
25 an order.

1 MR. GIUFFRA: Yeah, but --

2 MS. DERMODY: Thanks, Your Honor.

3 MR. GIUFFRA: -- again, Your Honor, let me just
4 raise another question just for clarification.

5 THE COURT: Yep.

6 MR. GIUFFRA: Now, with respect to the named
7 plaintiffs am I correct that, you know, Judge Torres said that
8 all we're dealing with in phase one is generalized proof in a
9 most recent order. Their claims, which are highly
10 individualized, pregnancy discrimination, things -- someone
11 not getting transferred from Miami, those are phase two
12 issues, correct?

13 THE COURT: Yes.

14 MR. GIUFFRA: Okay. And then in terms of -- in
15 terms of injunctive relief, which Your Honor said was going to
16 be pushed off, we do think there is an important issue that
17 should be briefed. Again, they made the election not to seek
18 injunctive relief. They abandoned it.

19 THE COURT: I'm not saying it won't be briefed, just
20 saying it's not going to be dealt with now.

21 MR. GIUFFRA: But the only reason why I think it's
22 important --

23 THE COURT: Okay.

24 MR. GIUFFRA: -- to deal with it now is we need to
25 know in terms of fact discovery and experts are we looking at

1 some sort of a classwide injunctive relief claim in a (b)(3)
2 class action. And unless we --

3 THE COURT: Well, we don't have a (b)(3) class
4 action, that's for sure.

5 MR. GIUFFRA: Oh no, we do have. That's --

6 THE COURT: I'm sorry, (b)(2).

7 MR. GIUFFRA: -- we don't have a (b)(2) class
8 action. And, you know, there are many cases that make it quite
9 clear that unless you're seeking an injunction you can't get
10 injunctive relief. That's why --

11 THE COURT: Right. No, I understand. There's
12 disagreement on this. You're saying better to get it resolved
13 earlier because of discovery and planning. Ms. Dermody, do
14 you have any problem with it getting decided earlier rather
15 than later?

16 MS. DERMODY: I do because we've got -- I'm sorry,
17 Your Honor. That's really loud. We have a schedule for
18 decert. and summary judgment and all of that and this is just
19 loading this -- these arguments that we talk about well,
20 things will never die, into this phase. I think we -- Your
21 Honor a year ago had a sense of the proper order and we
22 should, you know, oblige Your Honor's instincts on that.

23 I also am just worried about the working the ref
24 situation here on the injunctive relief. Title VII has a
25 remedy for injunctive relief. It's in the complaint. It's in

1 our case now. It's still in our case. We've never had a
2 summary judgment against the remedy.

3 We got a class certified for damages under the
4 process that Wal-Mart requires because of the notice to the
5 class and the manageability of the case. But that doesn't
6 extinguish a remedy in the case. And if we get a liability
7 finding at phase one that says these practices were illegal,
8 they discriminate against women, an injunction is one of the
9 remedies that flows under Title VII that's still in the case.

10 So all of this strikes me as a lot of, like, puffing
11 about ultimately nothing. And we should put it in the place
12 it deserves in the case which is when we deal with decert. and
13 summary judgment.

14 MR. GIUFFRA: Your Honor, respectfully, I think it's
15 front and center in the case. And we spent a lot of time
16 about, you know, some of the discovery issues here, but unless
17 something like is there an injunction still possible in a
18 (b)(3) class action where they've abandoned their claim for an
19 injunction under (b)(2). That's a legal question. There's
20 certainly enough lawyers on both sides to brief that legal
21 question.

22 THE COURT: Well, it will be briefed at some point.

23 MR. GIUFFRA: And -- but it needs to be briefed now
24 because, you know, what kind of an injunction are they
25 seeking. She keeps talking about classwide liability after

1 phase one. There is no phase one classwide liability finding.
2 It's about a presumption shift. And that issue --

3 THE COURT: I know. I know that's your position.
4 I'm not taking any position on that right now. The ref feels
5 equally pummeled on both sides, so no worries. All right.

6 MR. GIUFFRA: But I -- but Your Honor --

7 THE COURT: Yeah.

8 MR. GIUFFRA: -- I hardly see -- you know, if each
9 side put in a brief of, say, 15 pages on this issue -- I mean,
10 Ms. Dermody loves to say oh, it's clear Title VII law. And
11 then we look at the cases she cites and they're completely not
12 on point. And so let's brief it.

13 We're ready to leap to -- I actually thought what we
14 would do today is -- and I'm glad you've resolved some of the
15 issues, but we're happy to brief these issues because unless
16 we know what's happening in phase one we don't know what fact
17 witnesses we need, we don't know what expert witnesses we
18 need.

19 And part of the problem is they have a conception of
20 phase one that they can just throw everything into the kitchen
21 soup, into the -- I guess that's not the right expression,
22 maybe it is -- and that -- and that -- or to a giant pot --

23 THE COURT: If it's my child, it's accurate.

24 MR. GIUFFRA: -- of stew -- into a stew and just
25 spin it --

1 THE COURT: Right.

2 MR. GIUFFRA: -- and then we get some judgment,
3 that's not what the law allows particularly in a case like
4 this one.

5 Everyone has said this is a case which is -- there's
6 -- you can't point to a case like this one. I keep asking
7 them to cite one that's like it. So we need to deal with
8 these rules of the road issues before we shut down discovery
9 so we know what's going to happen.

10 I don't want to appear at a trial before Judge
11 Torres and then suddenly find out it's a completely different
12 case than what we all thought it was and what discovery we
13 took and what fact and what experts we put forward. It's just
14 it's not fair and we're just putting error into the record.
15 Let's get it resolved now.

16 THE COURT: I'm glad you both think that there's
17 error either path I take. That --

18 MS. DERMODY: Your Honor, we just --

19 MR. GIUFFRA: I think -- I suspect both sides will
20 think there are. Who's right, you know, we'll see.

21 MS. DERMODY: You know, the --

22 THE COURT: Right.

23 MS. DERMODY: -- court in the Vulcan case dealt with
24 these things in phases and including the injunctive remedy
25 happened after the class trial. So there is no need to front

1 load like what will the injunction look like two years from
2 now or whenever. I mean the court will decide it.

3 THE COURT: No, those injunctions are always dealt
4 with on briefing afterwards.

5 MS. DERMODY: Yes.

6 MR. GIUFFRA: And, Your Honor, again, proving my
7 point, the Vulcan case as I best recall is a test case.
8 Clearly not something as complicated as the Goldman Sachs
9 multi-factor processes.

10 THE COURT: Every case is different.

11 MR. GIUFFRA: Plus, Your Honor, I believe there was
12 a -- I believe there was a claim under (b)(2) for an
13 injunction in the Vulcan case.

14 THE COURT: Okay.

15 MR. GIUFFRA: And so that's the legal question that
16 I think is --

17 THE COURT: No, it's a good question.

18 MR. GIUFFRA: -- before the court which is, you
19 know, they made the decision to abandon their (b)(2)
20 claim --

21 MS. DERMODY: We did not do that.

22 MR. GIUFFRA: -- so -- I think you did. You
23 abandoned it. At least I think there's court papers that say
24 that. You withdrew your motion. So that has to have some
25 consequence. It's not like you can just use (b)(3) to get an

1 injunction. Why do people move under (b)(2) then? And I
2 think part of the problem is they made the decision to abandon
3 their claim for injunctive relief.

4 So our request, Your Honor, is let's brief the
5 issue. Let's get Your Honor to decide it. There's -- you
6 know, this is not a -- we're not asking for a hundred pages.
7 Fifteen pages, both sides and Your Honor gets the benefit of
8 it and can make a ruling.

9 THE COURT: I understand the request. It'll be
10 taken under advisement. On -- let's see. Oh, the last issue
11 I have are the status reports and other filings. And I did
12 sort of -- I did indicate that 25 pages was what I was
13 shooting for as a max without saying it hard and fast. I'm
14 not going to litigate who's responsible for undue length.

15 I do agree that the rehashing of the trial issues
16 was somewhat gratuitous, could've just referred back to the
17 prior status reports and positions. Nonetheless, parties
18 should just be careful about the limits. I have no problem
19 though with exhibits and charts and lists that are really sort
20 of just summaries of data or similar type of information. If
21 it's just rehashing of arguments, no, we don't do that.

22 All right. That's what I have on my list based on
23 the status report. Is there anything else from the plaintiff?

24 MS. DERMODY: Should we schedule another get
25 together, Your Honor?

1 THE COURT: Yes, we're going to have to do that
2 separately when my deputy is back tomorrow. She will reach
3 out.

4 MS. DERMODY: Okay.

5 THE COURT: And -- I know. Yeah. I'm going to ask
6 about that. Wait. Before you go just let me ask you so we're
7 going to talk to -- we'll resolve a date, did you have
8 anything else?

9 MS. DERMODY: No, Your Honor. Thank you.

10 THE COURT: Okay.

11 MS. DAVIDOFF: Your Honor, just in light of the fact
12 that Your Honor has twice rephrased interrogatories from
13 plaintiff we wanted to ask if it might be possible for Goldman
14 Sachs to have some additional interrogatories to serve on
15 plaintiffs.

16 THE COURT: This is just dealing with one that was
17 an issue about not being answered and finding a way to stay
18 it. This isn't about issuing all sorts of new
19 interrogatories. Are you --

20 MS. DAVIDOFF: We --

21 THE COURT: -- have you used up your
22 interrogatories?

23 MS. DAVIDOFF: -- have, Your Honor. And typically
24 when an interrogatory is objected to and not responded to as
25 some of ours were that still counts as an interrogatory. So

1 we hoped that --

2 THE COURT: Was this among those -- well, was what
3 you had in mind among those that were responded to and not
4 answered -- but not answered?

5 MS. DAVIDOFF: Pardon, Your Honor?

6 THE COURT: What were -- was what you have in mind
7 something that wasn't answered in a previous interrogatory or
8 is it a whole new interrogatory?

9 MS. DAVIDOFF: You know, we hadn't zeroed in on
10 that. It just seemed like another two interrogatories might
11 be appropriate in the light of the fact.

12 THE COURT: Talk about it with your adversaries, see
13 if they are amenable to it because it might actually make
14 things efficient and it might make things clear. It could be
15 useful. And we'll take it from there.

16 MS. DAVIDOFF: Thank you, Your Honor.

17 THE COURT: Okay. Anything else from the
18 defendants?

19 MR. GIUFFRA: Not that I can think of. You may not
20 see us till next year.

21 THE COURT: Oh, so we're going to talk about date,
22 but I also want to talk about a date, which may be the same,
23 for oral argument of the two motions that are pending. We
24 could do that as part of the next time we meet, but I agree
25 that for status purposes we're not going to meet till January

1 and perhaps we'd be able to squeeze it in December.

2 You're all pulling out your calendars, but I'm going
3 to have to have my deputy confer and check my calendar as
4 well. Is there any distinct preference among parties as to
5 whether it take place as a separate event in December or be
6 done in conjunction with our next status conference?

7 MS. DERMODY: No, Your Honor, not on our side. I
8 think we just need to know the dates.

9 THE COURT: Yes.

10 MS. DERMODY: It might affect that choice.

11 THE COURT: Of course.

12 MR. GIUFFRA: Yeah, I think January would be fine,
13 Your Honor.

14 THE COURT: Okay. All right. So we will arrange it
15 and we'll take care of it. I want to say everyone who argued
16 did an excellent job and I really appreciate the fact that you
17 are spreading the wealth in terms of the many issues. I think
18 it's great and it's great giving people responsibility and
19 it's nice to see. So everyone be well and --

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1 I, Shari Riemer, certify that the foregoing is a court
2 transcript from an electronic sound recording of the
3 proceedings in the above-entitled matter.

4
5 *Shari Riemer*

6 Shari Riemer, CET-805

7 Dated: November 21, 2019
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